FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HATTIE STAR,
Plaintiff-Appellant,

No. 99-55624

v.

D.C. No.
CV 98-419 RSWL

TOGO WEST, Acting Secretary,
Department of Veterans Affairs,
Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Submitted October 13, 2000*
Pasadena, California

Filed January 18, 2001

Before: A. Wallace Tashima and Richard C. Tallman,
Circuit Judges, and William Alsup, District Judge.**

Opinion by Judge Tashima

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*The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).
**The Honorable William Alsup, United States District Judge for the Northern District of California, sitting by designation.

Labor and Employment/Sexual Harassment

The court of appeals affirmed a judgment of the district court. The court held that counseling of an alleged sexual harasser may be a sufficient response by an employer who also moves the purported harasser to another shift, tells him to avoid the complainant, and states to him that the allegations

were serious.

Appellant Hattie Star complained to supervisor James Craig on September 13, 1996 that Oliver Watson had harassed her sexually. Craig confronted Watson, told him that the allegations were serious, and directed him to stay away from Star.

The next work day, Craig reported the incidents to his superior, who instructed Craig to investigate, inform Watson that the allegations were serious, and to instruct both Watson and Starr not to confront each other. Craig did so, again telling Watson on September 18 to stay away from Star.

On September 27, Star again complained to Craig about Watson, this time saying that she was afraid of him. She admitted to Craig that Watson had not done anything more to bother or frighten her since the initial incidents she reported. According to Star, Watson never touched her again.

On October 15, Star filed a complaint with the Equal Employment Opportunity officer, claiming that not enough had been done in response to her allegations. Two days later, Watson received a transfer to another shift. Although VA employees did not consider this to be a disciplinary action per se, they deemed it a precautionary measure in response to the EEOC complaint. The EEOC complaint concluded that there was insufficient evidence to support a claim of sexual harassment.

COUNSEL

George Baltaxe, Encino, California, for the plaintiff-appellant.

Ira A. Daves, Assistant United States Attorney, Los Angeles, California, for the defendant-appellee.

OPINION

TASHIMA, Circuit Judge:

Plaintiff-Appellant Hattie Star asserts a hostile environment

sexual harassment claim under Title VII of the Civil Rights

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Act of 1964, 42 U.S.C. § 2000e, against Defendant-Appellee Togo West, Jr., Acting Secretary of Veterans Affairs (VA). She appeals from the judgment in favor of the VA entered after a court trial. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291, and we affirm.

I. BACKGROUND

At the time of the events complained of, Star was employed as a housekeeper at the West Los Angeles Veterans Affairs Medical Center. Her complaint is based on alleged harassment by a coworker, fellow housekeeper Oliver Watson.

At trial, Star claimed to be the victim of harassment that began in 1994 and lasted through the Fall of 1996. The district court found, however, that no harassment occurred before the Fall of 1996, and Star does not appeal that finding.

Consequently, the only events at issue on this appeal are two instances of unwelcome physical contact that occurred on September 12 and 13, 1996, during the same work shift. In each instance, Watson grabbed or put his arms around Star. At trial, Star claimed that Watson had squeezed her breasts, but her prior statements indicated only that he had grabbed her shoulders and hips. The district court did not resolve this conflict in the evidence as to the parts of Star's body that were touched or the manner in which they were touched.

On September 13, 1996, Star reported these incidents to her supervisor, James Craig. On the same day, Craig confronted Watson with the allegations, told him that the allegations were serious, and told Watson to stay away from Star.

On the next work day, Craig reported the allegations to his superior, who instructed him to investigate the allegations, inform Watson that the allegations were serious, and instruct both parties not to confront each other. Craig testified that he carried out all of these instructions, again telling Watson, on

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September 18, 1996, to stay away from Star. This testimony was uncontradicted.

On September 27, 1996, Star again complained to Craig about Watson, this time telling Craig that she was afraid of Watson.**1** Craig asked Star whether Watson had done anything more to bother or frighten her since the September 12 and 13 incidents, and she said that he had not. Star testified that Watson never touched her again after September 13.

On October 15, 1996, Star, still feeling afraid of Watson and believing that not enough was being done in response to her allegations, filed a complaint with the Equal Employment Opportunity (EEO) officer at the VA. Two days later, Watson was transferred to a different shift from the one that he and Star had worked on previously. Watson's new shift overlapped with Star's by one and one-half hours. VA employees testified that the shift change was not a disciplinary action against Watson but rather was a "precautionary measure" in response to the EEO complaint. Administrative review of the EEO complaint concluded that there was insufficient evidence to support a claim of sexual harassment.

Star subsequently commenced this action for sexual harassment on a hostile work environment theory. After a three-day bench trial, the district court found in favor of the VA. The court found that the two incidents of unwelcome physical contact had occurred, assumed arguendo that those incidents created a hostile work environment, but held that Star "failed to sustain her burden of presenting sufficient evidence to establish that defendant knew or should have known that additional disciplinary action, termination or reassignment was appropriate or warranted."

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1 There was uncontradicted testimony at trial that Watson, a Vietnam veteran, was frequently intoxicated at work, sometimes spoke of having killed people (both while in the service and afterward), and so forth. Defense counsel conceded, in his opening statement, that Watson's disciplinary record was indefensible.

II. STANDARD OF REVIEW

The district court's findings of fact are reviewed for clear error. Diamond v. City of Taft, 215 F.3d 1052, 1055 (9th Cir. 2000). Its conclusions of law are reviewed de novo. Cigna Property and Cas. Ins. Cos. v. Polaris Pictures Corp., 159 F.3d 412, 418 (9th Cir. 1998). The district court's determination that the employer "took immediate and appropriate reme-

dial action . . . is reviewed de novo," because it presents a mixed question of law and fact. Intlekofer v. Turnage, 973 F.2d 773, 777 (9th Cir. 1992).

III. DISCUSSION

"Once an employer knows or should know of [coworker] harassment, a remedial obligation kicks in." Fuller v. City of Oakland, 47 F.3d 1522, 1528 (9th Cir. 1995). Such an employer will be liable for the hostile work environment created by the coworker unless "the employer. . . take[s] adequate remedial measures in order to avoid liability." Yamaguchi v. United States Dep't of the Air Force, 109 F.2d 1475, 1482 (9th Cir 1997). The employer's actions should be "reasonably calculated to end the harassment." Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991).

Star contends that the district court erred in finding that the VA's response to the harassment was adequate. She relies first on language in several of our cases indicating that an adequate employer response must always involve some form of "discipline" of the harasser. See Yamaguchi, 109 F.3d at 1483 (stating that "the employer's actions must .. . discipline the offender"); Intlekofer, 973 F.2d at 777 (stating that the employer "must take some form of disciplinary action"). She then argues that the testimony of several VA managerial employees shows that none of the steps taken with respect to Watson--informing him of the allegations and their seriousness, ordering him to stay away from Star, and moving him

to a different shift--constituted or are considered to be "disciplinary action."

We reject this argument. Although the cases in question do not define precisely what is meant by "discipline," the VA's failure to characterize its actions as "disciplinary" would, in any case, not be sufficient to show that they were not "disciplinary" within the meaning of the rule applied in those cases.**2**

The discussion in the cited cases makes clear that counseling or admonishing the offender can constitute an adequate "disciplinary" response. In Yamaguchi, we affirmed the district court's denial of the plaintiff's motion for partial summary judgment on the issue of employer liability despite the

fact that the offender was never "officially disciplined or reprimanded for his actions" but was "ordered to have no further contact with" the plaintiff, was moved to a different work site, and was forced to turn in his key to his previous work site. See 109 F.3d 1483. In Intlekofer, we stated that "counseling sessions are not necessarily insufficient," although we stressed that they can be sufficient "only as a first resort." 973 F.2d at 779-80. Those cases therefore do not hold that counseling can never be a sufficient response.

In addition, Watson was not merely counseled. After having been ordered to leave Star alone, he was moved to a different shift, even though Star admitted that the initial order had brought an end to Watson's harassing conduct. An employer's refusal to apply the label "discipline " to any of these actions is not determinative of their adequacy as a remedy. What is important is whether the employer's actions, however labeled, are adequate to remedy the situation.

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2 Conversely, of course, labeling an action as "disciplinary" would not be the end of the inquiry.

Star's reliance on Fuller is likewise misplaced. The defendant in that case took no remedial action whatsoever, and the court held that the offender's voluntary cessation of harassing conduct was in itself insufficient to discharge the defendant's remedial obligation. See Fuller, 47 F.3d at 1528-29. Because the VA did take remedial action when informed of Watson's conduct, Fuller is inapplicable.

IV. CONCLUSION

The VA promptly responded to Star's complaints by counseling Watson and ultimately moving him to a different shift. The district court's determination that this response was adequate, given what the VA knew or should have known, is not erroneous. The judgment of the district court is therefore

AFFIRMED.